

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TEXAS
 WACO DIVISION
3 SPACE EXPLORATION *
 TECHNOLOGIES CORP. *
4 * July 10, 2024
 VS. *
5 * CIVIL ACTION NO. 6:24-CV-203
 NATIONAL LABOR RELATIONS*
6 BOARD, ET AL. *

7 BEFORE THE HONORABLE ALAN D ALBRIGHT
 PRELIMINARY INJUNCTION HEARING

8
9 APPEARANCES:

10 For the Plaintiff: Michael E. Kenneally, Esq.
 Morgan, Lewis & Bockius LLP
 DC Office
11 1111 Pennsylvania Avenue, NW
 Washington, DC 20004-2541
12
 Catherine L. Eschbach, Esq.
13 Stefanie R. Moll, Esq.
 Morgan, Lewis & Bockius, LLP
14 1000 Louisiana St., Suite 4000
 Houston, TX 77002
15
 Harry I. Johnson III, Esq.
16 Morgan Lewis
 2049 Century Park East, Suite 700
17 Los Angeles, CA 90067-3109

18 For the Defendant: David P Boehm, Esq.
 National Labor Relations Board
19 Contempt, Compliance and Special
 Litigation Branch
20 1015 Half St SE, 4th Floor
 Washington, DC 20003

21 Court Reporter: Kristie M. Davis, CRR, RMR
22 PO Box 20994
 Waco, Texas 76702
23 (254) 666-0904

24 Proceedings recorded by mechanical stenography,
25 transcript produced by computer-aided transcription.

01:53 1 (Hearing begins.)

01:53 2 DEPUTY CLERK: A civil action in Case
01:53 3 6:24-CV-203, Space Exploration Technologies Corp.
01:53 4 versus National Labor Relations Board, et al. Case
01:53 5 called for a preliminary injunction hearing.

01:53 6 THE COURT: Announcements from counsel,
01:53 7 please.

01:53 8 MR. KENNEALLY: Good afternoon, Your
01:53 9 Honor. Michael Kenneally on behalf of SpaceX.

01:53 10 MS. ESCHBACH: Catherine Eschbach on
01:53 11 behalf of SpaceX.

01:53 12 MS. MOLL: Stefanie Moll on behalf of
01:53 13 SpaceX.

01:53 14 MR. BOEHM: David Boehm on behalf of the
01:54 15 defendants.

01:54 16 MR. JOHNSON: Excuse me, Your Honor.
01:54 17 Harry Johnson on behalf of SpaceX.

01:54 18 THE COURT: Okey dokey. We'll start with
01:54 19 the motion for injunction. And what would help me is
01:54 20 if you could as clearly as possible articulate on the
01:54 21 record kind of the scope of the injunction that you're
01:54 22 seeking.

01:54 23 MR. KENNEALLY: Thank you, Your Honor. I
01:54 24 would start with that then.

01:54 25 THE COURT: And also -- I'm sorry to

01:54 1 interrupt you. With regard to the exhibits, I
01:54 2 understand there's a fight over them. I'm going to --
01:54 3 I think there's six exhibits. I'm going to allow them
01:54 4 to be used in the hearing.

01:54 5 MR. KENNEALLY: Great. Thank you, Your
01:54 6 Honor. That was also going to be where I was going to
01:54 7 start. And unless there are other evidentiary issues
01:54 8 that opposing counsel intends to raise, we think that
01:54 9 the issues can be decided on the exhibits already in
01:54 10 the record and based on the parties' legal arguments
01:54 11 today. And we'll proceed on that basis unless told
01:55 12 otherwise.

01:55 13 Your Honor, just to start where Your
01:55 14 Honor started, we believe that an appropriate
01:55 15 injunction in this case would be purely targeted to the
01:55 16 administrative proceeding in NLRB Case No. 19-CA-309274
01:55 17 which is at -- cited at -- in Paragraph 30 of our
01:55 18 complaint. That is the administrative proceeding that
01:55 19 is at issue here involving separation agreements and
01:55 20 arbitration agreements, and we think that the
01:55 21 preliminary injunction would simply direct the
01:55 22 defendants in this action to cease processing that case
01:55 23 until further order of this Court. And I think that
01:55 24 that would do the trick.

01:55 25 We're not asking for a broad injunction

01:55 1 against all agency proceedings. If everybody -- or
01:55 2 even all agency proceedings against SpaceX. We think
01:55 3 that the injunction here is appropriately targeted to
01:56 4 that particular administrative law proceeding.

01:56 5 I'm happy to field any other questions if
01:56 6 Your Honor has at the outset, and if not, I have a few
01:56 7 remarks that I'd like to make on the first, third and
01:56 8 fourth preliminary injunctive motion factors, and then
01:56 9 of course permission -- my colleague Catherine Eschbach
01:56 10 will handle the second which goes to irreparable
01:56 11 injury.

01:56 12 The Fifth Circuit has recognized that
01:56 13 likelihood of success is the most important of the
01:56 14 preliminary injunction factors. Our complaint asserts
01:56 15 two removable protection claims and we have moved for a
01:56 16 preliminary injunction based upon both. We are likely
01:56 17 to succeed on both, but I'll start with our claim
01:56 18 challenging the multiple errors of removal protections
01:56 19 for NLRB administrative law judges. I'll just call
01:56 20 them ALJs.

01:56 21 Fifth Circuit precedent makes our
01:56 22 likelihood of success on this claim open and shut.
01:56 23 Defendants have not disputed that the Fifth Circuit's
01:57 24 decision in Jarkesy involving SEC ALJs is binding
01:57 25 precedent in this circuit. They haven't argued the

01:57 1 Supreme Court's affirmance of that decision somehow
01:57 2 alters its status as binding precedent, nor have they
01:57 3 argued that there's any basis to distinguish Jarkesy
01:57 4 based on some difference between NLRB ALJs and SEC
01:57 5 ALJs. And that's for good reason. In Jarkesy the
01:57 6 Fifth Circuit set forth a simple rule. If ALJs are
01:57 7 inferior officers under Article 2, they have enough of
01:57 8 a role in the execution of the laws that multiple
01:57 9 layers of removal protection make them insufficiently
01:57 10 accountable to the president.

01:57 11 In determining whether SEC ALJs were
01:57 12 inferior officers, the Fifth Circuit looks to the
01:57 13 Supreme Court's analysis in Lucia versus SEC, and that
01:57 14 approach makes this Court's task straightforward
01:57 15 because the NLRB itself has already recognized that
01:57 16 ALJs are inferior officers under Lucia. And that's in
01:57 17 the Westrock Services case from the NLRB that we cited
01:58 18 where the Court said there's no meaningful distinction
01:58 19 between the SEC ALJs and NLRB ALJs for the Lucia
01:58 20 analysis.

01:58 21 So just like the SEC ALJs, NLRB ALJs
01:58 22 exercise enough of an executive function that they may
01:58 23 not be subject to multiple layers of removal
01:58 24 protection. Just like the SEC ALJs, they are. The
01:58 25 ALJs are protected from removal. The MSPB various

01:58 1 protection board members are protected from removal and
01:58 2 the National Labor Relations Board, NLRB, members are
01:58 3 protected from removal. So we are likely to succeed on
01:58 4 this claim, but this arrangement of multilayer removal
01:58 5 protection is unconstitutional.

01:58 6 Defendants' only argument against our
01:58 7 likelihood of success on this claim is that we
01:58 8 additionally need to show that our ALJ would have been
01:58 9 removed but for the removal protection such as the
01:58 10 heading at Page 16 of their opposition brief, but
01:58 11 that's not the law of the Fifth Circuit.

01:58 12 Defendants derive that requirement from
01:58 13 the Supreme Court's decision in Collins versus Yellen,
01:59 14 but as the en banc Fifth Circuit explained a few years
01:59 15 later in Cochran versus SEC, Collins governs when a
01:59 16 litigant is seeking to void an agency action based on
01:59 17 removal protections, but it does not apply when a
01:59 18 litigant, quote, seeks administrative adjudication
01:59 19 tainted -- untainted -- excuse me -- by
01:59 20 separation-of-powers violations. That's Footnote 16.

01:59 21 So -- and also neither the Supreme Court
01:59 22 in Free Enterprise Fund nor the Fifth Circuit in
01:59 23 Jarkesy required that additional showing of but for
01:59 24 causation in declaring that the officers in those cases
01:59 25 were unlawfully protected from removal by the

01:59 1 president. So there is no reason to impose that
01:59 2 additional requirement here.

01:59 3 While our likelihood of success on the
01:59 4 ALJ removal protection claim is sufficient to justify
01:59 5 the injunction we seek, we are also likely to succeed
01:59 6 on our NLRB members' claim. Defendants fail to grapple
01:59 7 with the NLRB's unique structure which does invest all
02:00 8 of its power in the multi member head of the five
02:00 9 member board. Instead, it spreads executive power
02:00 10 between the board members and its politically
02:00 11 accountable general counsel which, as the Fifth Circuit
02:00 12 held in Exela Enterprises, is an officer who is subject
02:00 13 to removal by the president without cause.

02:00 14 Now, the general counsel exercises some
02:00 15 prosecutorial functions for the board. The board
02:00 16 members exercise prosecutorial functions as well. And
02:00 17 that's most clear in Section 10(j) of the NLRA which is
02:00 18 29 USC 160(j) which gives the board prosecutorial
02:00 19 authority to bring action in federal court.

02:00 20 The Fifth Circuit addressed that
02:00 21 provision in Overstreet versus El Paso Disposal and in
02:00 22 that case recognized that that authority belongs to the
02:00 23 board itself in the first instance and defendants'
02:00 24 prosecutorial function.

02:00 25 And in addition, a second distinguishing

02:01 1 feature of the NLRB as opposed to the FTC is that the
02:01 2 NLRB's removal protections are stricter than the ones
02:01 3 that the Supreme Court upheld for the SEC in Humphrey's
02:01 4 Executor.

02:01 5 The Humphrey's Executor removal
02:01 6 restriction allowed removal for inefficiency, neglect
02:01 7 of duty or malfeasance in office, but the NLRB board
02:01 8 members are removable for neglect of duty or
02:01 9 malfeasance of office but for no other cause. So that
02:01 10 means that inefficiency is out and a board member who's
02:01 11 merely doing a poor job cannot be removed by the
02:01 12 president because that is not one of the specified
02:01 13 causes. You have to rise to the level of neglect or
02:01 14 malfeasance.

02:01 15 And as a result, the Court would have to
02:01 16 extend Humphrey's Executor in order to find that the
02:01 17 removal protections for the board members, strict as
02:01 18 they are, in the context of the NLRB's unique structure
02:01 19 are lawful under Seila law and the Supreme Court's
02:01 20 other recent cases.

02:01 21 Before I hand over the mic, I want to say
02:01 22 a brief word about the third and fourth preliminary
02:02 23 injunction factors, and I can be brief on this issue
02:02 24 because the government has no legitimate interest in
02:02 25 proceeding in an unconstitutional manner. And its

02:02 1 doing so is very much against the public interest.

02:02 2 Sure, the board has an interest in
02:02 3 enforcing the federal labor law statute, but that
02:02 4 interest can't override compliance with the
02:02 5 Constitution, as the ends don't justify the means. And
02:02 6 the Fifth Circuit's recent decision in BST Holdings
02:02 7 versus OSHA recognizes this point. An agency's
02:02 8 interest in acting unlawfully and unconstitutionally is
02:02 9 illegitimate and the public has an interest in
02:02 10 maintaining our constitutional structure despite the
02:02 11 agency's broader objectives.

02:02 12 So for these reasons, we think Factors 1,
02:02 13 3 and 4 all weigh in our favor, and I'm happy to turn
02:02 14 over the mic to Ms. Eschbach to talk about -- unless
02:02 15 the Court has further questions for me.

02:02 16 THE COURT: Let me ask you this: Would
02:02 17 you prefer to argue on each point one at a time or
02:02 18 would you rather have them finish and go all at once?

02:03 19 MR. BOEHM: I would prefer to go all at
02:03 20 once.

02:03 21 THE COURT: Okay. That'll be fine.

02:03 22 Yes, ma'am.

02:03 23 MS. ESCHBACH: Thank you, Your Honor.

02:03 24 I'm going to be addressing the second
02:03 25 factor of irreparable harm.

02:03 1 Axon makes this a much simpler case than
02:03 2 what the NLRB would represent to this Court. In Axon
02:03 3 it holds that a proceeding in front of an illegitimate
02:03 4 decisionmaker is a here-and-now injury that is
02:03 5 impossible to remedy once the proceeding is over.

02:03 6 It also states that once a proceeding has
02:03 7 already happened, it cannot be undone. Judicial review
02:03 8 would come too late to be meaningful.

02:03 9 Under Fifth Circuit precedent -- and we
02:03 10 cited this in our brief, Daniels Health Science -- all
02:03 11 that you have to show to show irreparable harm is that
02:03 12 there's harm for which there's no adequate remedy at
02:04 13 law.

02:04 14 Axon says there's a here-and-now injury.
02:04 15 It also says that it is impossible to remedy once the
02:04 16 proceeding is over.

02:04 17 Deerfield Medical Center, which is Fifth
02:04 18 Circuit precedent as well, states that deprivation of
02:04 19 constitutional rights is irreparable harm even if it
02:04 20 occurs for a minimal time.

02:04 21 What we are here asking the Court today
02:04 22 is to enter a preliminary injunction until this case
02:04 23 can be resolved on the merits so this Court can
02:04 24 determine what that appropriate type of relief is to
02:04 25 fashion.

02:04 1 The NLRB would have this Court believe
02:04 2 that because they think this can be severed, any deep
02:04 3 constitutional defect is subject to severance. He
02:04 4 can't show irreparable harm. But that is a question
02:05 5 for the merits remedy stage. They don't dispute that
02:05 6 under Doran there is no such thing as a preliminary
02:05 7 declaration. This Court cannot say, I can sever this
02:05 8 and so there's not going to be any harm.

02:05 9 Free Enterprise Fund holds that we are
02:05 10 entitled to a declaration that -- that ensures that the
02:05 11 standards to which we are a subject in this proceeding
02:05 12 will only be enforced by a constitutional agency
02:05 13 accountable to the executive.

02:05 14 Now, my colleague Michael has already
02:05 15 touched on the other point that they raised which is
02:05 16 the Collins versus Yellen point. In our view, the
02:05 17 Fifth Circuit en banc court has already decided that
02:05 18 Collins does not apply here. That's Footnote 6 of
02:06 19 their decision.

02:06 20 And as discussed in our supplemental
02:06 21 briefing that we submitted yesterday, on Jarkesy, the
02:06 22 Cochran case was affirmed by the U.S. Supreme Court
02:06 23 under Axon. But Axon did not in any way disturb the
02:06 24 holding of Footnote 16 which distinguishes between when
02:06 25 a litigant is seeking to void the acts of the

02:06 1 illegitimate officer and when a litigant is seeking an
02:06 2 administrative communication untainted by separation of
02:06 3 powers violations.

02:06 4 We are not seeking to void any act here.
02:06 5 In fact, it would be quite odd because no proceeding
02:06 6 has taken place, so there is no act for us to go back
02:06 7 to. What we are seeking is a proceeding that is
02:06 8 entirely untainted by constitutional infirmity.

02:06 9 So we believe that this Court is bound by
02:07 10 what the Fifth Circuit has said on this which is that
02:07 11 the Collins analysis is not the analysis that applies
02:07 12 here. We believe that this is a Free Enterprise Fund
02:07 13 case and what this Court needs to do is pause the
02:07 14 status quo until it can get to a merits determination
02:07 15 and figure out what the appropriate remedy is there.

02:07 16 For this reason, also, the recent Fifth
02:07 17 Circuit cases that NLRB has cited such as Community
02:07 18 Financial Services Association and Collins versus
02:07 19 Department of Treasury are inapposite because those are
02:07 20 also cases in which they are seeking to void an act.

02:07 21 Now, I want to say a little bit on the
02:07 22 prospective retrospective relief point that they cite
02:07 23 to. Again, that is in the context of a rule that has
02:07 24 already been issued. And so they are seeking to enjoin
02:08 25 prospective enforcement. Those cases were not

02:08 1 scenarios where they were trying to stop the rule
02:08 2 making from going forward under the illegitimate
02:08 3 decisionmaker in the first place which is what we have
02:08 4 here.

02:08 5 Nor is this harm speculative. The NLRB
02:08 6 administrative proceeding here is still on the
02:08 7 calendar. As my friend Mr. Boehm represented at the
02:08 8 Tuesday hearing, they're contemplating when this can
02:08 9 possibly move forward again. He said it would move
02:08 10 forward no earlier than October, but that's when our
02:08 11 original date is -- was. October 29th.

02:08 12 If Your Honor's not familiar with how
02:08 13 these proceedings play out at the administrative stage,
02:08 14 prior to the hearing opening before the ALJ, there's
02:08 15 often motion practice, discovery, all things which an
02:08 16 ALJ is going to need to decide.

02:08 17 I can represent here that SpaceX at some
02:09 18 point in that proceeding in the months going forward
02:09 19 would be moving to dismiss on jurisdictional grounds
02:09 20 and an ALJ would have to decide that motion.

02:09 21 In tying in the board members as well,
02:09 22 the board members play roles before the ALJ proceeding.
02:09 23 They sign the subpoenas.

02:09 24 In the motions practice there's possibly
02:09 25 a special appeal.

02:09 1 And so even if a hearing date is
02:09 2 postponed, there are things that SpaceX needs to know
02:09 3 whether it should act on in that proceeding that will
02:09 4 depend on whether or not an injunction issues here.

02:09 5 Going to the other forms of relief or the
02:09 6 other forms of irreparable harm discussed in our brief
02:09 7 in the Mlodzianowski declaration, to be clear, we view
02:09 8 this as a belts and suspenders. We think based off the
02:09 9 Axon alone, the scheduling of the hearing with the ALJ
02:09 10 who's unconstitutionally insulated and the whole
02:10 11 proceedings in front of the board show irreparable
02:10 12 injury under Supreme Court and Fifth Circuit precedent.
02:10 13 However, these forms of harm set out in her declaration
02:10 14 are additional ways that the proceeding would harm us.
02:10 15 The costs will never be recovered. These are not
02:10 16 typical litigation costs. We're not saying we should
02:10 17 be prevented from having the costs come into court to
02:10 18 get the injunction. We are saying if there isn't an
02:10 19 illegitimate proceeding going forward, we don't have to
02:10 20 prepare for it. We don't have to spend that money.
02:10 21 SpaceX isn't having irreparable harm to its reputation
02:10 22 which the Fifth Circuit in Burgess versus FDIC has held
02:10 23 that that is sufficient to satisfy any irreparable
02:10 24 injury and that a party should not have to go forward
02:10 25 in an illegitimate proceeding to clear their name.

02:11 1 And so we think that we have sufficiently
02:11 2 proved up through the evidence we have submitted that
02:11 3 SpaceX will in fact suffer irreparable harm because the
02:11 4 proceeding as a whole is illegitimate and we have the
02:11 5 right to have a proceeding free from that taint of
02:11 6 illegitimacy on the front end.

02:11 7 Now, just one final word on the severance
02:11 8 points. Again, as I mentioned earlier, we do not
02:11 9 believe that severance is for the Court at this
02:11 10 juncture. However, I want to point out --

02:11 11 THE COURT: I'm -- either I didn't follow
02:11 12 you or you maybe left a word out. Could you go back
02:11 13 about two sentences and -- I didn't follow what you
02:11 14 said.

02:11 15 MS. ESCHBACH: Sorry, Your Honor.

02:11 16 One final word on the severance point, to
02:11 17 be clear, we do not believe severance is before the
02:11 18 Court at this juncture. However, I would like to call
02:12 19 this Court's attention to Footnote 49 of that NLRB's
02:12 20 response where they say this Court need not decide now
02:12 21 precisely how it would sever the statute in order to
02:12 22 find that SpaceX is not entitled to the requested
02:12 23 injunctive relief. This is absolutely incorrect, as we
02:12 24 laid out in our brief. The severance questions here
02:12 25 are quite tricky. If I were to take off my advocate

02:12 1 hat and put on my objective hat, I don't honestly know
02:12 2 how you solve the problem of what Congress would have
02:12 3 wanted you to sever here.

02:12 4 And so I think the representation that
02:12 5 you can just say, oh, this is severable without
02:12 6 figuring out how you would actually sever it, should
02:12 7 the Court decide it needs to do that, is highly
02:12 8 problematic because until this Court figures out how it
02:12 9 would sever it, it cannot in fact figure it out that --
02:12 10 whether severance would even be appropriate here or
02:13 11 whether this is something that needs to go back to
02:13 12 Congress.

02:13 13 And so as I said, we don't think the
02:13 14 Court needs to get there on this motion, but if this
02:13 15 Court is inclined to do so, it can't just take the
02:13 16 NLRB's word that it can sever this and solve any
02:13 17 constitutional harm to us. This Court would need to
02:13 18 make a determination whether in fact severance would be
02:13 19 appropriate here.

02:13 20 Unless the Court has any further
02:13 21 questions.

02:13 22 THE COURT: I don't.

02:13 23 MS. ESCHBACH: Thank you.

02:13 24 MR. BOEHM: Good afternoon, Your Honor.

02:13 25 Let me give you the bottom line up front

02:13 1 here. SpaceX presents two claims in this case: That
02:14 2 board members are unconstitutionally shielded from
02:14 3 removal by the president and that ALJs are likewise
02:14 4 shielded from removal by the executive.

02:14 5 SpaceX failed to state a claim on either
02:14 6 count because it fails to even plead much less prove up
02:14 7 the elements necessary to show our right to relief for
02:14 8 an officer removal claim. Those are a substantiated
02:14 9 desire by the president to remove the officer of
02:14 10 perceived inability to remove that officer and nexus
02:14 11 between that desire and the challenged action.

02:14 12 The Fifth Circuit recently held this in
02:14 13 the CFS -- I'm sorry -- CFSA case, and that's
02:14 14 determinative here.

02:14 15 Because SpaceX failed to make out a --
02:14 16 these requirements of causal harm, it both loses on the
02:14 17 merits of its claims and cannot succeed to show that it
02:14 18 would suffer irreparable harm because it has no legal
02:15 19 injury.

02:15 20 SpaceX's only response on this point is
02:15 21 to say that these requirements don't apply to it
02:15 22 because the holding in CFSA dealt with a rule as
02:15 23 opposed to an adjudication, but there's nothing in the
02:15 24 reasoning of that decision to suggest that the elements
02:15 25 necessary to make out a removal claim depend on the

02:15 1 type of action that's being challenged.

02:15 2 As to its likelihood of success on the
02:15 3 board member removability claim, this is foreclosed by
02:15 4 the Fifth Circuit's recent decision in Consumers'
02:15 5 Research cited in the papers which reaffirms validity
02:15 6 of Humphrey's Executor for any, quote, traditional
02:15 7 multi member agency.

02:15 8 Now, SpaceX tries to quibble over the
02:15 9 types of protections that were involved in Humphrey's
02:16 10 Executor, but Consumers' Research involved the exact
02:16 11 same types of protections that NLRB members enjoy.

02:16 12 I would also note that the scholarly
02:16 13 article we cited in our opposition discussed the issue
02:16 14 of inefficiency. That's a 19th century addition that
02:16 15 dealt with patronage problems. It's not necessary to
02:16 16 any responsibility under the take care clause.

02:16 17 The traditional two requirements of --
02:16 18 that would allow removal for malfeasance in office for
02:16 19 neglect of duty are adequate to satisfy that
02:16 20 constitutional requirement.

02:16 21 As to their claim about the
02:16 22 responsibility of board members under Section 10(j),
02:17 23 I'd like to note that there's no 10(j) issue in this
02:17 24 case. It's a commonplace observation that you have to
02:17 25 have subject-matter jurisdiction for reform or relief

02:17 1 you're seeking. And the fact that there may be some
02:17 2 other action that an officer might do in some other
02:17 3 case does not support relief here. So the 10(j) issue
02:17 4 is a red herring.

02:17 5 So even if -- let me just make sure I'm
02:17 6 not -- as to the issue about SEC's ALJs, we don't have
02:17 7 to reach that here. There are some differences as
02:17 8 noted in the Jarkesy Supreme Court decision. SEC's
02:17 9 ALJs can adjudicate penalties. They can adjudicate
02:18 10 things that resemble common-law claims which are not
02:18 11 the types of claims that are adjudicated by the Court.
02:18 12 But that's not something the Court needs to address in
02:18 13 this posture.

02:18 14 Even if success on the merits were
02:18 15 assumed here, SpaceX cannot show any irreparable harm.
02:18 16 And this is fatal to their injunction. Their first
02:18 17 attack is to try to conflate the observations that an
02:18 18 unconstitutional decisionmaker presents a here-and-now
02:18 19 injury from Axon to establish that that's a per se
02:18 20 irreparable harm.

02:18 21 As the Tenth Circuit recently noted in
02:18 22 the Leachco case, however, this is not supported by
02:18 23 that case law. And it doesn't make sense on its own
02:18 24 terms. If any challenged action were irreparable and
02:18 25 it allowed you to get an injunction, we'd be down the

02:18 1 road of any property forfeiture or anything that was
02:19 2 arguably a violation of some of these constitutional
02:19 3 rights supporting injunctive relief, and that can't be.

02:19 4 I would also note that the types of cases
02:19 5 where a party who was only entitled to legal relief
02:19 6 like declaratory relief could obtain a preliminary
02:19 7 injunction, and they cite Doran and I believe there's a
02:19 8 couple of others, only deal with situations where
02:19 9 there's ruinous consequences that would prevent the
02:19 10 Court from actually reaching a final decision. I think
02:19 11 in Doran that the party would have been rendered
02:19 12 bankrupt. There was another case involving a party
02:19 13 that would have had to cease doing business. And then
02:19 14 I think there was another case Mississippi Power &
02:19 15 Light they cited that was not on point. It had to do
02:19 16 with the ability of the Court that -- it seemed to be
02:19 17 an issue of practicality in that case of being able to
02:19 18 actually craft a remedy even though there was an
02:19 19 undisputed legal claim.

02:20 20 So that does not follow the fact that
02:20 21 there's no declaratory -- there's no interim
02:20 22 declaratory relief entitles you to an injunction. It
02:20 23 just doesn't. It doesn't follow.

02:20 24 Similarly in Burgess, that dealt with a
02:20 25 case where under securities regulations the person

02:20 1 would have been out of a job. They wouldn't have been
02:20 2 able to find employment in their profession if the
02:20 3 proceeding had been allowed to go forward and stand.

02:20 4 And that sort of blends into the other
02:20 5 weaknesses in their irreparable harm claims here. They
02:20 6 are entirely speculative. First of all, as to the
02:20 7 issue of having to defend yourself in an administrative
02:20 8 proceeding, there's long-standing case law in the
02:20 9 Supreme Court *FTC versus Standard Oils*, the lead case,
02:21 10 saying that having to defend yourself before a
02:21 11 government proceeding is not irreparable harm.

02:21 12 And people made similar claims in the
02:21 13 earliest days of NLRA and the Fifth Circuit guided them
02:21 14 down. I believe we cited cases from 1936 explaining
02:21 15 that this is not the sort of harm that equity will
02:21 16 interfere to prevent.

02:21 17 As to their supposed reputational harm or
02:21 18 their ability to recruit and retain talent or obtain
02:21 19 government contracts, there's exactly zero facts behind
02:21 20 any of those assertions. All we have is a statement
02:21 21 from a person who appears to have no direct knowledge
02:21 22 of any facts that would support that. So they fail to
02:21 23 make out any showing of harm on that front.

02:21 24 As to the cases showing that, you know,
02:21 25 even short constitutional deprivations can provide

02:22 1 harm, first of all, most of those cases involve
02:22 2 standing.

02:22 3 But the other thing I would note is that
02:22 4 all those cases that I'm aware of involve individual
02:22 5 rights. Usually it's a freedom of speech claim or
02:22 6 religious freedom claim. Certain privacy claims, cases
02:22 7 involving abortion, fall into that category as well.

02:22 8 So the only -- the only harm they can
02:22 9 come up with here is having to defend themselves before
02:22 10 an administrative agency in a case that -- you know,
02:22 11 they make some discussion about distraction from their
02:22 12 mission. This case would involve no witness testimony
02:22 13 that we're aware of. This could be decided on the
02:22 14 papers. It's about the validity under the NLRA of
02:23 15 proffered agreements, arbitration and separation
02:23 16 agreements. So the burden on SpaceX is minimal here
02:23 17 and would be undertaken likely solely by their
02:23 18 attorneys.

02:23 19 I want to correct a couple of
02:23 20 misstatements. The discussion that we were
02:23 21 contemplating when we could -- when we could put this
02:23 22 case back on the calendar is not true. We inquired and
02:23 23 we were told that there was no date available before
02:23 24 the October date, and in any event, they wouldn't be
02:23 25 able to schedule it before then. And that was just for

02:23 1 our information going to the last hearing in this case.

02:23 2 As so the discussion of -- there's one
02:23 3 rather actually glaring misstatement of the law I want
02:23 4 to point out in the reply, and it involved -- let me
02:24 5 see if I can find it here. It involved the discussion
02:24 6 of removability claims as opposed to officer
02:24 7 appointment claims, and it conflated the two. And it
02:24 8 was a discussion of the case in SpaceX versus Bell.

02:24 9 So I believe it was on Page 7 of their
02:24 10 reply. I can address that -- I'm sorry -- after I've
02:24 11 returned to my counsel table.

02:24 12 As to the final two factors, as we laid
02:25 13 out in the briefs that the law enforcement function of
02:25 14 the board is important both for employees to know that
02:25 15 their rights are protected in the workplace. But on a
02:25 16 broader scale, these types of challenges, if they're
02:25 17 allowed to go forward, are just going to bring more
02:25 18 people to the floor and they're going to essentially
02:25 19 subject the board's proceeding to a preclearance
02:25 20 requirement, and that is not in the public interest.

02:25 21 And I'd be happy to answer any questions.

02:25 22 THE COURT: Okay.

02:25 23 MR. KENNEALLY: Your Honor, I just wanted
02:26 24 to make a few points in rebuttal if I may on the
02:26 25 likelihood of success point that opposing counsel

02:26 1 raised.

02:26 2 We think that the claims with respect to
02:26 3 NLRB members fall squarely within the exception in
02:26 4 Consumers' Research that Mr. Boehm was talking about
02:26 5 because in that case the Court was dealing with the
02:26 6 Consumer Product Safety Commission which it noted was
02:26 7 traditionally structured. Here, as we've argued, the
02:26 8 NLRB is not traditionally structured in the way that
02:26 9 the CAPSC is because it divides this authority between
02:26 10 politically accountable general counsel and the board
02:26 11 members. And some of the board members' authority is
02:26 12 prosecutorial, nothing executive in nature.

02:26 13 And we're not raising a claim about the
02:26 14 board's Section 10(j) authority or the
02:26 15 constitutionality of that authority in this case. So
02:26 16 it's not a red herring. What it is relevant to is what
02:27 17 sort of authority the board exercises, and answering
02:27 18 that question is essential in order to know whether the
02:27 19 removal protections are unlawful under the Supreme
02:27 20 Court's text.

02:27 21 The argument that there is an element to
02:27 22 a removal protection claim, that there must be a
02:27 23 substantial desire to remove the -- substantiated
02:27 24 desire to remove the relevant officer and that that
02:27 25 desire has been frustrated because of the removal

02:27 1 protections, that is not true. That line of cases, as
02:27 2 we've already discussed it but today, from the Collins
02:27 3 versus Yellen decision and the Fifth Circuit has not
02:27 4 applied that in the context of what I'll just call an
02:27 5 Axon proceeding where a plaintiff is coming into court
02:27 6 and asking for relief so it doesn't have to undergo an
02:27 7 unconstitutionally structured administrative
02:27 8 proceeding.

02:27 9 Also the FTC versus Standard Oil case
02:27 10 that opposing counsel referenced which talks about
02:28 11 irreparable harm in the context of agency proceedings.
02:28 12 It wasn't dealing with the irreparable harm that comes
02:28 13 from undergoing unconstitutionally structured
02:28 14 administrative agency proceedings. And I just don't
02:28 15 understand how the Supreme Court could hold in Axon and
02:28 16 the Fifth Circuit en banc could hold in Cochran that
02:28 17 having to undergo administrative proceedings is injury
02:28 18 and it can't be repaired afterwards is somehow not up
02:28 19 to the level of irreparable injury. By definition
02:28 20 that's irreparable injury.

02:28 21 In the Bell case which Mr. Boehm referred
02:28 22 to, while it did grant relief on an appointments clause
02:28 23 claim rather than a removal protection claim, it
02:28 24 specifically cited the Axon case in addressing
02:28 25 irreparable injury, and that is fully consistent with

02:28 1 Cochran as well and with Fifth Circuit case law.

02:28 2 The Tenth Circuit's decision in Leachco
02:28 3 didn't apply. The Cochran case that's obviously
02:28 4 binding here is an en banc Fifth Circuit decision. It,
02:28 5 instead, misconstrued Consumers' Research which, as
02:29 6 Ms. Eschbach pointed out, is about prospectively
02:29 7 enjoining a rule that was issued by a protected agency
02:29 8 decisionmaker. That is a scenario where the Collins
02:29 9 versus Yellen requirement for causal harm comes into
02:29 10 play because the litigant is attempting to undo or at
02:29 11 least nullify the effect of something that has already
02:29 12 taken place. And that is what is not allowed.

02:29 13 But in Free Enterprise Fund and in Axon
02:29 14 and in Cochran, the Supreme Court has said if there is
02:29 15 an unconstitutionally structured agency proceeding, a
02:29 16 litigant has a right before undergoing it to get that
02:29 17 constitutional problem addressed if it can be
02:29 18 addressed.

02:29 19 The idea that recognizing that clear
02:29 20 implication of Axon would open the floodgates to all
02:29 21 sorts of unconstitutional rights violations isn't
02:29 22 correct. It's not just any violation of constitutional
02:29 23 rights that would support a preliminary injunction
02:30 24 because you would also need to show that you can't
02:30 25 repair that violation of constitutional rights at the

02:30 1 end through monetary leave.

02:30 2 So, for example, if the government takes
02:30 3 my property, I can't go into court to preliminarily
02:30 4 enjoin necessarily if I can be made whole at the end of
02:30 5 the proceeding through damages.

02:30 6 Here, however, under Axon, that
02:30 7 constitutional violation cannot be remedied after the
02:30 8 fact and therefore the requirements for injunctive
02:30 9 relief are met.

02:30 10 I don't think there's any basis to limit
02:30 11 the irreparable injury analysis to what Mr. Boehm
02:30 12 called individual rights because constitutional rights
02:30 13 are constitutional rights, and, again, in Axon the
02:30 14 Supreme Court concluded that that sort of the right at
02:30 15 issue here not being required to undergo
02:30 16 unconstitutionally structured proceedings is an
02:30 17 important constitutional right in its own respect. And
02:30 18 if that is true, it cannot be repaired, violations of
02:31 19 that right cannot be repaired after the fact, then it
02:31 20 is irreparable injury.

02:31 21 Unless the Court has any questions for
02:31 22 me, I'll cede the podium. Thank you.

02:31 23 THE COURT: Yes, sir.

02:31 24 Is your point that there is no
02:31 25 constitutional injury, that if there is a

02:31 1 constitutional injury, that's not irreparable harm, or
02:31 2 a combination? I'm not sure I'm following you.

02:31 3 MR. BOEHM: I mean, I think it's -- I
02:31 4 think it's both. They haven't made out the claim
02:31 5 necessary to establish an injury, but even if they
02:31 6 could succeed on the merits of their claim, it's not
02:31 7 the type of relief for which an injunction is available
02:31 8 because, you know, my learned friend here mentioned
02:32 9 Free Enterprise Fund. It's not as if the Supreme Court
02:32 10 hasn't thought about the issue of remedy. They did
02:32 11 think about it and they said you're entitled to a
02:32 12 declaratory ruling.

02:32 13 So I think that --

02:32 14 THE COURT: What would the relief be?

02:32 15 MR. BOEHM: As we discussed, it would be
02:32 16 a declaration probably severing the statute. The exact
02:32 17 scope of that severance is something that we'd have
02:32 18 to -- you know, would be for the Court to decide, but
02:32 19 that is the type of remedy that the Supreme Court has
02:32 20 endorsed in these cases.

02:32 21 THE COURT: Could I hear a response to
02:32 22 that?

02:32 23 And then you're welcome to say anything
02:32 24 else you might want to in rebuttal.

02:32 25 MR. KENNEALLY: So assuming that the

02:32 1 Court could perform a severability analysis and come to
02:32 2 the conclusion that Congress would have intended this
02:32 3 or that removal protection to be severed in order to
02:32 4 cure the constitutional violations, Ms. Eschbach
02:33 5 pointed out, we think that that's actually a virtue of
02:33 6 the analysis here because you need to -- the multiple
02:33 7 layers of removal of protection that are the
02:33 8 constitutional problem for the ALJs and there are three
02:33 9 possible removal protections on the chopping block as
02:33 10 it were. There are the ALJs, the NLRB members and the
02:33 11 MSPB members. And so figuring out which two of the
02:33 12 three Congress would have wanted to go is very
02:33 13 difficult especially because ALJs by design are
02:33 14 supposed to be independent from their agencies and SPB
02:33 15 members are supposed to be independent from the
02:33 16 president and NLRB members are supposed to be
02:33 17 independent from the president. You have to knock out
02:33 18 two of those three and decide if Congress would have
02:33 19 wanted that.

02:33 20 But the real key point here I think is
02:33 21 that as tricky as that analysis is, that is still a
02:33 22 victory for SpaceX because it concedes that there is a
02:33 23 constitutional problem as the agency is currently
02:33 24 structured. So in Free Enterprise Fund, the challenger
02:34 25 there won the case and got that declaratory relief. So

02:34 1 that can't possibly be an impediment to our succeeding
02:34 2 on the merits.

02:34 3 And if that severability analysis could
02:34 4 be achieved, we would still be undergoing irreparable
02:34 5 harm until it happened. And that's why we think to
02:34 6 preserve the status quo, the injunction is warranted.

02:34 7 THE COURT: Well, so counsel just argued
02:34 8 the harm is not irreparable.

02:34 9 MR. KENNEALLY: Right. And that's what
02:34 10 I'm saying is it isn't consistent with Axon because the
02:34 11 harm here in this type of structural constitutional
02:34 12 challenge is having to undergo the illegitimate
02:34 13 proceeding before the illegitimate decisionmaker, and
02:34 14 that can't be -- that Genie can't be put back in the
02:34 15 bottle at the end even if we get a piece of paper that
02:34 16 says, oh, by the way, all along the president had the
02:34 17 ability to fire this, that or the other official and no
02:34 18 one knew it, but, you know, congratulations. Here's
02:34 19 your piece of paper. That has to happen to be
02:34 20 meaningful if -- assuming it could be severed -- any of
02:34 21 those could be severed before for the proceeding takes
02:35 22 place. Otherwise this has no value.

02:35 23 THE COURT: Understood.

02:35 24 MR. KENNEALLY: Thank you.

02:35 25 THE COURT: Is there anything else you

02:35 1 care to say?

02:35 2 MR. BOEHM: No.

02:35 3 THE COURT: Okay. Anything else from you

02:35 4 all?

02:35 5 MR. KENNEALLY: No, Your Honor.

02:35 6 (Off-the-record bench conference.)

02:36 7 THE COURT: The Court is going to grant
02:36 8 the injunction.

02:36 9 We'll get a written order out hopefully
02:36 10 in due -- well, in due course but hopefully within a
02:36 11 couple of weeks if not sooner.

02:36 12 Is there anything -- I'll start with
02:36 13 defendants. Is there anything else we need to take up?

02:36 14 MR. BOEHM: I just wanted to correct my
02:36 15 one statement. I said it was on Page 6. It's on
02:36 16 Page 5 of their reply brief, the discussion of Bell.

02:36 17 THE COURT: Anything else?

02:36 18 MR. BOEHM: No.

02:36 19 THE COURT: Anything else from plaintiff?

02:36 20 MR. KENNEALLY: Nothing from us, Your
02:36 21 Honor.

02:36 22 THE COURT: Okay.

02:36 23 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)

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5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
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13 Certified to by me this 12th day of July
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/s/ Kristie M. Davis
KRISTIE M. DAVIS
Official Court Reporter
PO Box 20994
Waco, Texas 76702
(254) 666-0904
kmdaviscsr@yahoo.com